

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permit 5221)	ORDER:	WR 93-3
(Application 9230),)	SOURCE:	East and West
SUTTER BYPASS PROPERTIES, INC.,)		Dredge Cuts of
)		Sutter Bypass
Permittee)	COUNTY:	Sutter

ORDER REVOKING PERMIT

BY THE BOARD:

1.0 INTRODUCTION

The State Water Resources Control Board (State Water Board) having initiated statutory revocation proceedings concerning Permit 5221 pursuant to Water Code Section 1410 et seq. Sutter Bypass Properties, Inc., permittee, having requested a hearing on the proposed revocation of the permit; notice of a hearing having been given; a hearing having been held on April 29, 1992 by the State Water Board; Sutter Bypass Properties, Inc., and staff of the Division of Water Rights (Division) having appeared and presented testimony and exhibits at the hearing; the evidence having been duly considered; the State Water Board finds as follows:

2.0 SUMMARY OF RECORD REGARDING PERMIT 5221

Application 9230 was filed February 1, 1938 for 57.06 cubic feet per second (cfs): 8 cfs to be directly diverted from the East Dredge Cut; and 49.06 cfs to be directly diverted from a moveable point along Nelson Slough and the West Dredge Cut. The water was to be diverted from March 1 to November 1 for irrigation of 2362 acres. The permit was issued October 5, 1938. Recreation use for duck hunting was added to the permit by State Water Board Order dated June 25, 1975.

Ownership of Permit 5221 has changed hands several times. On April 22, 1987, ownership of the permit was assigned to James W. Taylor, who transferred the property to Sutter Bypass Properties, Inc. on March 9, 1992. (STAFF,5c) Pursuant to Water Code Section 1398, extensions of time since the permit was issued were granted on the following dates:

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|----------------------|----------------------|
| 1. December 11, 1944 | 8. January 3, 1962 |
| 2. November 9, 1948 | 9. March 6, 1963 |
| 3. November 13, 1951 | 10. November 1, 1966 |
| 4. November 28, 1952 | 11. January 9, 1970 |
| 5. December 30, 1955 | 12. June 25, 1975 |
| 6. July 1, 1959 | 13. August 19, 1983 |
| 7. December 22, 1960 | 14. October 8, 1986 |

Progress reports were filed regularly since the time the permit was issued in 1938 until 1988. No progress reports have been filed since that time.

3.0 HEARING ISSUES

The purpose of the April 29, 1992 hearing was to receive testimony and other evidence regarding the following key issues:

- o Should Permit 5221 be revoked because work on the project has not been completed with due diligence or because water has not been applied to beneficial use in accordance with the terms and conditions of the permit?
- o If an extension of time is granted to pursue completion of the project, what should the development schedule be?
- o Is permittee in compliance with the terms and conditions of Permit 5211? If not, what action should be taken by the State Water Board?

4.0 APPLICABLE LAW

Water Code Section 1410 et seq. governs revocation of permits. Section 1410(a) provides:

"There shall be cause for revocation of a permit if the work is not commenced, prosecuted with due diligence, and completed or the water applied to beneficial use as contemplated in the permit and in accordance with this division and the rules and regulations of the Board."

5.0 LACK OF DILIGENCE

As noted in Section 2.0 above, the State Water Board has granted 14 extensions of time since Permit 5221 was issued

in October 1938. The last extension of time, granted October 8, 1986, approved the following new development schedule:

Complete construction work: December 1, 1988
Complete use of water: December 1, 1989

That order required the permittee to consult with the Division of Water Rights and perform an irrigation system evaluation to meet the requirements of the water conservation term contained in Permit 5221. It also required the permittee to maintain records of all diversions at all facilities within the project area so that the maximum amount of water placed to beneficial use could be determined for licensing purposes. In addition, the Department of Fish and Game had protested the extension petition, and the permittee had accepted fish screen requirements to dismiss the protest. The fish screen requirement was added to the permit by a State Water Board Order dated July 22, 1987. The July 1987 order also restated the irrigation system evaluation term (standard term 29c) previously required by the 1986 order. (STAFF 1)

James W. Taylor purchased the property shortly after the 1986 order was issued and was provided information regarding his permit through his agent, including a copy of the 1986 order. He was also given an explanation of what was needed from him to comply with the permit conditions. Taylor also was provided a copy of the 1987 order. (STAFF 1)

The last progress report for Permit 5221 was submitted in 1988 for water use in 1987. An attachment to the report stated that the pumps used for irrigation were not located at the permitted points of diversion but at three points located on the Feather River (East Dredge Cut Sutter Bypass), presumably under claim of riparian right. (STAFF 1)

The project was last inspected on June 14, 1990. The authorized points of diversion had not been used for many years, although water was being diverted from points on the Feather River. Division staff found that: (1) a petition for extension of time should be submitted; (2) a petition for change in point of diversion should be submitted; (3) an irrigation system evaluation, required by State Water Board Orders dated October 8, 1986 and July 22, 1987 still needed to be done; and (4) fish screens, required under the July 22, 1987 Order, need to be installed for all points of diversion. The permittee was advised of these findings by letter dated July 17, 1990. The permittee did not respond and was later contacted in November 1990 and in February 1991, and again told that a petition for extension of time was necessary if permittee wished to continue development pursuant to the permit. No petition for extension of time was filed nor was any progress made to bring the project into compliance with the permit. (STAFF,1; T,25:7-16)

A notice of proposed revocation was sent to the permittee on April 23, 1991. The notice states that an extension of time to develop the project would be inappropriate due to the lack of diligence on the part of the permittee and that the project could not be licensed at the present level of use because there was no record of water being diverted from the authorized points of diversion for many years. (STAFF 1)

The permittee responded by letter to the notice of proposed revocation. Permittee stated that the property was damaged by flooding in 1986 and additional time was needed to reevaluate his irrigation operation. Permittee requested a hearing before the State Water Board to present evidence demonstrating why Permit 5221 should not be revoked.

(STAFF 1)

Approximately two weeks before the hearing, division staff was advised by letter from Taylor that he had transferred the place of use to Sutter Bypass Properties, Inc. The new property manager, Rob Wainwright, was contacted and agreed to appear at the hearing. (STAFF 1)

There is some question regarding Taylor's present involvement with the place of use. Documents obtained from the Sutter County Recorder's Office indicate that Goose Club

Farms, Inc. changed its name to Sutter Bypass Properties, Inc. on March 9, 1992. (STAFF 5a,5b,5c) Wainwright testified that he believed stock in Goose Club Farms, Inc. was owned by Taylor entirely. (T,28:12-29:8) However, Wainwright later testified that Taylor was not involved in this property in any way. (T,37:4-5)

Wainwright testified that he had assumed management of the property April 1, 1992 and has requested a five-year extension of time to study the irrigation system on the property. (T,31:18; 33:22-34:20) Wainwright claims that flood damage to the property in 1986 has prevented cultivation of parts of the place of use (T,30:25-31:20), and cost has been a factor in preventing development of the place of use. (T,32:16) Due to Wainwright's recent introduction to the project, he had no new evidence to add regarding the question of diligence on the part of the permittee. (T,51:8-52:16)

6.0 CONCLUSIONS

Fifty-three years have elapsed since Permit 5221 was issued on October 5, 1938. The points of diversion authorized in Permit 5221 have not been used for many years, and the water supply for irrigation of the property has been diverted from the Feather River under claim of riparian right.

The files indicate repetitive events of flooding and land reclamation over the history of the permit. In fact, regular flooding is inherent in the property due to its location in the Sutter Bypass. Due to the flood-prone nature of the property, flood damage is not justification for another extension of time, and 53 years is more than sufficient time to establish full beneficial use of water for an irrigation project such as described in Permit 5221.

Permittee claims that flood damage to the property in 1986 has prevented cultivation of parts of the place of use. The flood damage is on the east side of the property and would not appear to interfere with operation of the moveable point of diversion on the west dredge cut. Yet no diversion has been made from the west dredge cut while the permittee has pumped from the points on the Feather River. In addition, a license cannot be issued based on prior use because the permittee never established a record of diversion as required by previous State Board order.

Permittee claims that cost has been a factor in proceeding with reestablishing the permitted points of diversion. However, lack of finances, as well as occupation with other work, is not generally accepted as good cause for delay. Before an extension of time can be granted, the State Water Board must find that failure by the permittee to comply with

previous time requirements has been occasioned by obstacles which could not reasonably be avoided and that satisfactory progress will be made if an extension of time is granted. (Section 844, Title 23, California Code of Regulations) No evidence was presented to support such a finding. In fact, permittee stated that he did not have a specific plan for placing water to use under Permit 5221 and that further analysis would be needed before he could determine whether Permit 5221 would play a role in irrigation of the property. (T,51:25-52:7)

The State Water Board finds that there is cause to revoke Permit 5221.

ORDER

IT IS HEREBY ORDERED that Permit 5221 is revoked.

CERTIFICATION


The undersigned, Administrative Assistant to the State Water Board, does hereby certify that the foregoing is a full, true, and correct copy of an order fully and regularly adopted at a meeting of the State Water Resources Control Board held on March 18, 1993.

AYE: John Caffrey
 Marc Del Piero
 James M. Stubchaer

NO: None

ABSENT: None

ABSTAIN: None



Maureen Marché
Administrative Assistant to the Board

